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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL RICHARDSON, Plaintiff, **v.** **JEFFERSON SESSIONS, in his official capacities; XAVIER BECERRA, in his official capacities,** Defendants.	2:17-cv-1838 JAM AC PS **DEFENDANT'S REPLY IN FURTHER SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS** Date: February 6, 2019 Time: 10:00 a.m. Dept: 26 Judge: The Hon. Allison Claire Trial Date: 9/16/19 Action Filed: 9/5/2017

Defendant Attorney General Xavier Becerra, in his official capacity as Attorney General of the State of California, respectfully submits the following reply brief in further support of his motion for judgment on the pleadings.

ARGUMENT

I. THE FIRST AND FIFTH CLAIMS FOR VIOLATION OF SUBSTANTIVE DUE PROCESS FAIL TO STATE A CLAIM

A. Megan's Law Does Not Violate Plaintiff's Substantive Due Process Rights

Plaintiff has not and cannot show that Megan's Law violates his substantive due process rights. Plaintiff has failed to identify any fundamental right implicated by Megan's Law, and the applicable provisions of the law survive rational basis review.

Controlling Supreme Court and Ninth Circuit case law clearly establish that Megan's Law does not abridge any fundamental right identified by Plaintiff. In *U.S. v. Juvenile Male*, 670 F.3d 999, 1011 (2012), the defendants argued that the registration and internet publication provisions of the federal Sex Offender Registration and Notification Act ("SORNA") violated their substantive due process rights because the provisions violated defendants' "right to lifetime confidentiality" under the Federal Juvenile Delinquency Act and subjected them to "onerous lifetime probation." The Ninth Circuit held not only that defendants had failed to identify fundamental rights violated by SORNA, but that they could not do so based on the definition of fundamental rights set forth in *Washington v. Glucksburg*, 521 U.S. 702, 722 (1997). *Juvenile Male*, 670 F.3d at 1012 ("None of these rights are, or could be, asserted by defendants in this case."). The Court confirmed its ruling by citing its previous decision in *Doe v. Tandeske*, 361 F.3d 594, 597 (9th Cir. 2004), which examined Alaska's sex offender registration and publication law and where it "found that individuals convicted of serious sex offenses do not have a fundamental right to be free from sex offender registration requirements." *Juvenile Male*, 670 F.3d at 1012.

Here, Plaintiff attempts to assert the same rights as those rejected by the Ninth Circuit in *Juvenile Male* and *Tandeske*. First, Plaintiff argues that Megan's Law violates his privacy rights, citing Freedom of Information Act (FOIA) cases in support. That is the effectively same right at

issue in *Juvenile Male*, where the defendants unsuccessfully asserted the right to "confidentiality" of their past convictions. The FOIA cases also do not assist Plaintiff, as they involve privacy protections arising from FOIA itself, not the due process clause. See *U.S. Dept. of Justice v. Reporters Committee for Freedom of Press*, 489 U.S. 749, 755-56 (1989); *U.S. Dept. of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 492-501 (1994). Nor is Plaintiff aided by the Supreme Court's 1977 decision in *Whalen v. Roe*, 429 U.S. 589 (1977). That case did not purport to establish a generalized fundamental right to privacy, but rather considered the impact of a statute on the specific "zone of privacy" between doctor and patient. *Whalen*, 429 U.S. at 598-600. This was consistent with the Court's subsequent decision in *Glucksburg*, which specifically spelled out the particular zones of privacy that are fundamental (e.g. "the rights to marry," "to have children," "to direct the education and upbringing of one's children," "to marital privacy," "to use contraception," "to bodily integrity," and "to abortion"). *Glucksburg*, 521 U.S. at 721. None of those zones of privacy apply to this case; and any "zone of privacy" that is implicated here would be the same as in *Juvenile Male*, in any event. Plaintiff therefore has no fundamental right to privacy that is affected by Megan's Law.

Second, Plaintiff argues that Megan's Law violates his right to access social media websites. However, he points to no provision that prohibits such action. Plaintiff cites only third-party websites' own terms of use that purportedly prohibit participation by sex offenders. Of course, such terms of use do not provide plaintiff with any federal claim for relief against the California Attorney General.

Third, Plaintiff argues that Megan's Law violates a fundamental right to personal security. Again. Plaintiff cites no legal authority for this purported fundamental right. In any event, Megan's Law itself does not threaten Plaintiff with any bodily harm. Plaintiff argues that the law puts him at risk of vigilantism. However, as this Court has recognized, any such consequences "flow not from the [law's] registration and dissemination provisions, but from the fact of conviction, already a matter of public record." Findings and Recommendations on Defendant's Motion to Dismiss, ECF No. 24 at 13 (citing *Smith v. Doe*, 538 U.S. 84, 101 (2003)); see also *Russell v. Gregoire*, 124 F.3d 1079, 1092 (9th Cir. 1997) ("[O]ur inquiry into the law's effects

cannot consider the possible "vigilante" or illegal responses of citizens to notification. Such responses are expressly discouraged in the notification itself and will be prosecuted by the state."); Cal. Pen. Code § 290.46(h) (providing enhanced criminal penalties for use of Megan's Law website to commit a misdemeanor or felony).

Fourth, Plaintiff argues that he has a fundamental right to employment. Again, this interest is no different than the similar interest discussed, and rejected, in *Juvenile Male*, where defendants were concerned with the confidentiality of their criminal record and "onerous lifetime probation." *Juvenile Male*, 670 F.3d at 1011. Additionally, under *Smith v. Doe*, employment consequences flow from the fact of conviction, not Megan's Law. *Smith*, 538 U.S. at 100-101.

Finally, Plaintiff argues that under Megan's Law persons "who do not pose a significant danger to the community are at substantial risk of being erroneously deprived of their liberty interests." Plaintiff's Response to Defendant's Motion for Judgment on the Pleadings (Response) at 20. However, because Megan's Law is subject only to rational basis review, there is no requirement that the law be narrowly tailored to apply only to the sex offenders who are the most likely to pose a public danger. See *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1147 (2009) (defining strict scrutiny and rational basis review). And, under rational basis review, Megan's Law is constitutional because it "serve[s] a legitimate nonpunitive purpose of public safety, which is advanced by alerting the public to the risk of sex offenders in their community." *See Tandeske*, 361 F.3d at 597 (internal quotation omitted); *see also Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1234 (9th Cir. 1994) ("In a substantive due process challenge, we do not require that the City's legislative acts actually advance its stated purposes, but instead look to whether the governmental body could have had no legitimate reason for its decision." (internal quotation omitted)).

For these reasons, Plaintiff has failed to and cannot state a claim that Megan's Law violates his substantive due process rights.

B. SORA Does Not Violate Plaintiff's Substantive Due Process Rights

Plaintiff has likewise failed to state a claim that the registration requirements in SORA violate his substantive due process rights. The Ninth Circuit has held that 90-day registration

requirements for violent sex offenders and juvenile sex offenders do not implicate the types of rights that are fundamental under the constitution. *Litmon v. Harris*, 768 F.3d 1237, 1241 (2014); *Juvenile Male*, 670 F.3d at 1012. Here, Plaintiff's registration requirements are similar in frequency, and certainly of the same character. He alleges that he must register once per year and at the beginning and end of each academic term. Complaint at 81; Pen. Code §§ 290(a), 290.009, 290.012. SORA therefore does not implicate any fundamental rights of Plaintiff and is justified by the legitimate purpose of public safety. Plaintiff has failed to and cannot state a claim that SORA violates his substantive due process rights.

II. THE FIRST CLAIM BASED ON REPUTATIONAL INJURY ALSO FAILS TO STATE A CLAIM FOR PROCEDURAL DUE PROCESS

Plaintiff appears to concede that the Complaint does not state a procedural due process claim based on his reputational interest. *See* Response at 9, ln. 1-10. In any event, that argument is foreclosed by the Supreme Court's decision in *Connecticut Dept. of Public Safety v. Doe*, 538 U.S. 1 (2003), which held that injury to reputation does not support a procedural due process claim. *Connecticut Dept. of Public Safety*, 538 U.S. at 6-7. The Ninth Circuit has, moreover, specifically applied that rule in this context, holding that the "adverse publicity or harm to the reputation of sex offenders does not implicate a liberty interest for the purpose of [procedural] due process analysis." *U.S. v. Juvenile Male*, 670 F.3d 999, 1013 (9th Cir. 2012).

Plaintiff's first claim for violation of his reputational interests fails to and cannot state a claim for violation of his right to procedural due process.

III. THE SECOND CLAIM FOR VIOLATION OF EQUAL PROTECTION FAILS TO STATE A CLAIM

Plaintiff's claim for violation of equal protection also fails to state a claim upon which relief may be granted. For purposes of an equal protection analysis, SORA and Megan's Law are subject only to rational basis review because sex offenders are not a suspect or protected class. *Juvenile Male*, 670 F.3d at 1009; *U.S. v. LeMay*, 260 F.3d 1018, 1030-31 (9th Cir. 2001). Plaintiff has failed to show that there is no "reasonably conceivable state of facts that could provide a rational basis" for the classifying sex offenders differently than other types of felons.

F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 313 (1993). Megan's Law and SORA legitimately promote public safety by providing law enforcement and the public (including parents of young children) with basic information that allows them to identify convicted sex offenders who live nearby.

Plaintiff argues that his right to equal protection is violated because credit agencies may report information from the Megan's Law website to his potential employers. But unlike other kinds of criminal offender information, a certain amount of sex offender information is already publically disseminated by virtue of the Megan's Law website. The law authorizes any person to "use" that information, but "only to protect a person at risk." Cal. Pen. Code § 290.46(*l*)(1) & (2). Thus, when it comes to the hypothetical employment scenario posited by Plaintiff, the plain language of section 290.46 would generally prohibit basing a hiring decision on that information, with an exception available to "protect a person at risk." Additionally, a prospective employer who acts outside of that exception is liable for damages under California law. *Mendoza v. ADP Screening & Selection Services, Inc.*, 182 Cal.App.4th 1644, 1656-58 (2010). For these reasons, the relevant provision is reasonably related to the promotion of public safety. It therefore survives rational basis review.

Plaintiff has failed to and cannot state a claim for violation of equal protection.

IV. THE THIRD CLAIM FOR "RIGHT TO TRAVEL AND ASSOCIATION AND UNCONSTITUTIONALLY VAGUE" FAILS TO STATE A CLAIM

Plaintiff's third claim fails because he has identified no California law that abridges his right to travel or associate with others.

Plaintiff only cites an assortment of local ordinances, other states' registration requirements, and "International Megan's Law" as infringing on those rights. But under the Eleventh Amendment the California Attorney General is immune from claims challenging non-state laws where he does not have a "fairly direct" duty to enforce those laws. *See* Section VI, *infra*; *see also Long v. Van de Kamp*, 961 F.2d 151, 152 (9th Cir. 1992) (court lacks subject matter jurisdiction where defendant has Eleventh Amendment immunity); *L.A. County Bar Ass'n*

v. Eu, 979 F.2d 697 (9th Cir. 1992) (for *Ex Parte Young* doctrine to apply, state official's enforcement duty must be "fairly direct" rather than generalized).

Plaintiff has also not shown that any provision of SORA or Megan's Law is unconstitutionally vague. "To pass constitutional muster against a vagueness attack, a statute must give a person of ordinary intelligence adequate notice of the conduct it proscribes." *Craft v. Nat'l Park Serv.*, 34 F.3d 918, 921 (9th Cir. 1994); *accord California Pacific Bank v. Federal Deposit Insurance Corp.*, 885 F.3d 560, 571 (9th Cir. 2018). "Vague laws may trap the innocent by not providing fair warning." *Grayned v. City of Rockford* 408 U.S. 104, 108 (1972). Plaintiff argues that the provision in Section 290.46(*l*) permitting employment decisions on the basis of Megan's Law website information "only to protect a person at risk" is unconstitutionally vague. There are two problems with this argument. First, Plaintiff's Complaint contains no allegation identifying subdivision (*l*) as being unconstitutionally vague. Second, even if this claim had been alleged, it would fail. Subdivision (*l*) does not proscribe any behavior of the sex offender; it only proscribes behavior of a sex offender's employer or prospective employer. *See Mendoza*, 182 Cal.App.4th at 1656-58. Plaintiff's recourse is to seek civil relief against an employer that violated subdivision (*l*), and it would be up to the employer to argue that that law is unconstitutionally vague. *See id.* at 1656-58. Plaintiff himself has no basis for asserting a vagueness claim. *Hunt v. City of Los Angeles*, 638 F.3d 703 (9th Cir. 2011) ("to raise a vagueness argument, *Plaintiffs'* conduct must not be clearly prohibited by the ordinances at issue.") (emphasis added) (internal quotation omitted).

Plaintiff's third claim fails to and cannot state a claim upon which relief may be granted.

V. THE FOURTH CLAIM FOR "RIGHT TO BE FREE FROM UNREASONABLE, ARBITRARY, AND OPPRESSIVE OFFICIAL ACTION" FAILS TO STATE A CLAIM

As explained in Defendant's moving brief, Plaintiff's fourth claim is simply a reformulation of his substantive due process claim. *See* U.S. CONST. amends. V & XIV, § 1; *see also Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1234 ("Legislative acts that do not impinge on fundamental rights or employ suspect classifications are presumed valid, and this presumption is overcome only by a clear showing of arbitrariness and irrationality."); *see also U.S. v. Alexander*,

48 F.3d 1477, 1491 (9th Cir. 1995) ("If a statute is not arbitrary, but implements a rational means of achieving a legitimate governmental end, it satisfies due process.").

Like Plaintiff's first and fifth claims alleging violation of substantive due process, Plaintiff's fourth claim fails to and cannot state a claim upon which relief may be granted.

VI. THIS COURT LACKS SUBJECT MATTER JURISDICTION TO ADJUDICATE PLAINTIFF'S CLAIMS CHALLENGING FEDERAL AND LOCAL LAWS

This court lacks subject matter jurisdiction to adjudicate Plaintiff's claims arising out of federal and local laws because Defendant Attorney General Becerra does not have the requisite direct enforcement connection with those laws. *See Papasan v. Allain*, 478 U.S. 265, 276-77 (1986) (Eleventh Amendment immunity bars suit against the state); *L.A. County Bar Ass'n*, 979 F.2d at 704 (exception to Eleventh Amendment immunity applies only to suit against state official who directly enforces challenged law).

Plaintiff argues that this court has subject matter jurisdiction because the "case or controversy" requirement of Article III has been met. Response at 3-4. However, that requirement is separate and distinct from the jurisdictional issue of Eleventh Amendment immunity. *Compare* U.S. Const., Art. III, § 2 *with* U.S. Const., Amend. XI. Thus, even if a case or controversy exists, a court may still lack subject matter jurisdiction to hear a case due to a defendant's Eleventh Amendment immunity. *See Los Angeles Branch NAACP v. Los Angeles Unified. School Dist.*, 714 F.2d 946, 948-952 (9th Cir. 1983) (separately considering each jurisdictional issue). That is the situation here.[1]

Plaintiff's first through fifth claims against Defendant Attorney General Becerra should therefore be dismissed to the extent they challenge any federal or local laws.

[1] In the initial complaint Plaintiff did include as a defendant U.S. Attorney General Jefferson Sessions, presumably due to Plaintiffs' alleged concerns with the federal SORNA. *See* Complaint, ECF Nos. 1, 12. As a general matter, the United States Department of Justice is charged with defending against challenges to federal statutes. *See* 28 U.S.C. §§ 501 et seq. However, for reasons unknown to the California Attorney General, Plaintiff voluntarily dismissed Attorney General Sessions from this action. *See* ECF No. 17.

CONCLUSION

For the reasons above, Plaintiff's first through fifth causes of action fail to state a claim upon which relief may be granted. Defendant Attorney General Becerra respectfully requests judgment on the pleadings without leave to amend.

Dated: January 30, 2019

Respectfully Submitted,

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